87-1661

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,

v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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April 8, 1988

QUESTION PRESENTED

A federal statute, the Jones Act of 1927, which prohibits the sale of mineral lands granted by the federal government to the western states, empowers the states to lease mineral lands "as the State legislature may direct" so long as the proceeds are used for the support of public schools. For almost fifty years Arizona, in reliance on the Jones Act and a cognate amendment of the New Mexico-Arizona Enabling Act of 1910, has leased its mineral lands pursuant to a state statute providing for a uniform 5 percent royalty on the value of the minerals extracted.

The question is whether, as the Supreme Court of Arizona has held, Arizona's royalty statute is void, despite the broad power over mineral leasing granted to the state legislature, by reason of provisions of the original Enabling Act of 1910 granting only nonmineral lands, which require appraisal, public auction, and disposition at no less than the appraised value of lands granted by the act.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Arizona, whose judgment is sought to be reviewed, were Frank and Lorain Kadish, Marion L. Pickens, and the Arizona Education Association, plaintiff-appellants; the Arizona State Land Department, an agency of the State of Arizona, Joe T. Fallini, in his capacity as the State Land Commissioner (since succeeded by M. Jean Hassell), and Cyprus Pima Mining Company, on behalf of itself and others similarly situated, defendant-appellees; ASARCO Incorporated, Magma Copper Company, James P.L. Sullivan, Eisenhower Mining Company, Can-Am Corporation, intervenor-appellees; and the New Mexico Commissioner of Public Lands, amicus curiae. The parties joining in this petition are ASARCO Incorporated, Can-Am Corporation, Magma Copper Company, and James P.L. Sullivan.

LISTINGS REQUIRED BY RULE 28.1

ASARCO Incorporated does not have a parent company. Its subsidiaries and affiliates (other than wholly owned subsidiaries) are:

Alta Mining and Development Company (Utah)
Asarco Australia Limited (Australia)
Blackhawk Mining and Developing Company, Limited (Idaho)
Copper Basin Railway, Inc. (Delaware)
Federated Genco Limited (Canada)
Fry's Metals, Inc. (Delaware)
Geominerals, Ltd. (Bermuda)
Government Gulch Mining Company, Limited (Idaho)
Green Hill Cleveland Mining Company (Nevada)
LAB Chrysotile Inc. (Canada)
Liard River Mining Company Ltd. (N.P.L.)
Mexico Desarrollo Industrial Minero, S.A. (Mexico)
M.I.M. Holdings Limited (Australia)
Lesarco, Inc. (Philippines)
Neptune Mining Company (Delaware)
Corporacion Minera Nor Peru, S.A. (Peru)
Southern Peru Copper Corporation (Delaware)
Wyoming Mining and Milling Company, Limited (Idaho).

The parent of Can-Am Corporation is Chemstar, Inc. Can-Am Corporation does not have any subsidiaries or affiliates.

Magma Copper Company does not have any subsidiaries, except wholly owned subsidiaries. It is approximately 15 percent owned by Newmont Mining Corp. and approximately 17 percent owned by Gold Fields American Corp., each of which has numerous subsidiaries and affiliates that this petitioner has not undertaken to list in this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioners pray for a writ of certiorari to review a decision of the Supreme Court of Arizona.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 747 P.2d 1183 and is set forth in Appendix A, pp. 1a-36a, below. The opinion of the trial court, the Superior Court of Maricopa County, is unreported and is set forth in Appendix B, pp. 37a-39a, below.

JURISDICTION

The final judgment of the Supreme Court of Arizona was entered on December 10, 1987. Under Arizona practice, the filing of the opinion of the Supreme Court of

Arizona constitutes entry of the judgment. Respondents filed a timely motion for reconsideration of their claim against the state defendants on the issue of attorney's fees, which would not have altered the judgment with respect to these petitioners. The motion was denied on February 2, 1988. (App. D., p. 44a, below.) On February 25, 1988, Justice O'Connor granted petitioners' protective application for an extension of time, to and including April 8, 1988, within which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The relevant statutes are the Jones Act of 1927, Pub. L. No. 570 (ch. 57), 44 Stat. 1026, codified as amended at 43 U.S.C. § 870, the New Mexico-Arizona Enabling Act of 1910, as amended, Pub. L. No. 219 (ch. 310), §§ 24, 28, 36 Stat. 557, 572, 574, and Ariz. Rev. Stat. Ann. § 27-234(B). They are reproduced in Appendix E, pp. 46a-53a, below.

STATEMENT

Relevant Federal Statutes. By Section 24 of the New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219 (ch. 310) § 24, 36 Stat. 557, 572, Congress granted to the State of Arizona four sections of land in each township for the new state to use for the education of school children—a total of some eight million acres. At the time it was the longstanding practice of Congress to exclude mineral lands from its land grants, including grants to the states, and instead to reserve those properties exclusively to the federal government. Accordingly, the grant to Arizona in 1910 excluded mineral lands from the tracts granted. *See id.*; *United States* v. *Sweet*, 245 U.S. 563, 567-72 (1918).

Because some of the states admitted to the Union before Arizona and New Mexico had permitted the proceeds of their disposition of the lands granted to them

for the education of school children to be diverted to other uses, Congress in the Enabling Act of 1910 imposed restrictions on how Arizona (and New Mexico) could dispose of the nonmineral lands and surface assets that were granted to them by that act. *See* H.R. Rep. No. 152, 61st Cong., 2d Sess. 3 (1910); *see also* 45 Cong. Rec. 8227 (1910) (Sen. Beveridge). Section 28 of the 1910 Enabling Act (applicable to Arizona) declared that the lands granted to the state by Section 24 of the act "shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided." It prohibited the selling or leasing of the granted lands or their natural products except to the highest bidder at public auction after advertisement in a newspaper of general circulation. It also required all "lands, leaseholds, timber, and other products of land" to be appraised to determine their true value before they were offered for sale or lease and prohibited the state from selling or otherwise disposing of the granted tracts for less than the value so ascertained.

The exclusion of mineral lands from the lands granted to the western states generated considerable confusion with respect to title to lands found to contain mineral deposits after the grant to a state of nonmineral school lands had become effective. This Court ultimately ruled that, if land identified as state school land in the granting act was not known to be mineral at the time that the grant took effect, legal title passed to the state and was not defeated by a subsequent discovery of mineral deposits. *See, e.g., Wyoming* v. *United States*, 255 U.S. 489, 499-500 (1921).

Because factual questions persisted about when minerals were discovered, disputes continued as to whether the federal government or a state or its grantee held title to mineral lands in some eleven western states. Congress in 1927, therefore, enacted a statute that extended school land grants to the states to include lands

mineral in character. Pub. L. No. 570 (ch. 57), 44 Stat. 1026, as amended, 43 U.S.C. § 870. This act, known as the Jones Act of 1927, did not amend the New Mexico-Arizona Enabling Act of 1910 or any other state's enabling act. It granted to all of the school land-grant states the full title to the school sections specified in their respective enabling acts that were mineral in character. It prohibited the states from selling the minerals on the newly granted lands but expressly authorized each state to lease the mineral deposits "as the State legislature may direct," provided only that "the proceeds of rentals and royalties" from the leases were used in support of the state's public schools.

In 1936 Congress amended Section 28 of the New Mexico-Arizona Enabling Act by inserting a provision that "nothing herein contained shall prevent said State of Arizona from leasing in a manner as the State legislature may direct, any of said lands referred to in this section" for, among other purposes, "mineral" purposes for up to twenty years. Pub. L. No. 658 (ch. 517), 49 Stat. 1477-78 (1936). In 1951 Congress again amended Section 28 of the Enabling Act of 1910 to provide that the authority of the state legislature to lease lands for mineral purposes "in such manner as [it] may prescribe" was not affected by the fact that the lands might also be leased for grazing and agricultural purposes. This amendment also authorized oil and gas leases of indefinite duration without prior appraisal or public auction. Pub. L. No. 44 (ch. 120), 65 Stat. 51, 52 (1951).

Arizona's Mineral Leasing Program. In 1941 the Arizona legislature established the leasing regime that continues to govern all non-hydrocarbon mineral leases of state lands, including public school lands and others. The locator of mineral deposits is granted certain preferred rights to obtain a mineral lease from the state if it undertakes the exploration and developmental drilling necessary for mineral extraction. Ariz. Rev. Stat. Ann.

§§ 27-233, 27-254. Payments to the state for mineral leases are set at a uniform royalty rate of 5 percent of the net value of the minerals extracted from the state land in addition to a nominal annual rental. *Id.* § 27-234(A), (B). Mineral leases are for a maximum of twenty years. *Id.* § 27-235(A). Arizona has never required that payments to the state under mineral leases of state land be determined by a prior appraisal of the site and public bidding or that lease payments reflect the appraised value.

Petitioners hold mineral leases from the State of Arizona both on lands expressly granted to the state by the Jones Act of 1927 and on lands that were part of the 1910 grant in the Enabling Act and were subsequently found to contain mineral deposits and were held by this Court in *Wyoming* v. *United States*, 255 U.S. 489 (1921), to pass to the state by the original grant. During the fiscal year 1986-87, a total of $4,196,252 in mineral rentals and royalties was paid to the State of Arizona by lessees of state mineral lands, including petitioners and the class they represented below. Arizona State Land Department, *Annual Report* 34 (1987).

Proceedings Below. Respondents, a nonprofit education association and several taxpayers in Arizona, initiated this action in 1981 in the Superior Court of Maricopa County. They alleged that the Arizona statute authorizing a uniform royalty rate on minerals extracted from leased state lands was repugnant to Section 28 of the New Mexico-Arizona Enabling Act of 1910, as amended, and to article 10, section 4, of the Arizona Constitution, which is a rescript of Section 28 of the Enabling Act required by Congress to be included in the state's constitution. They asserted that, under Section 28 and the corresponding provision of the state constitution, mineral leases may be made only if each individual leased site is appraised before leasing, the leasing rights are auctioned, and payments under a lease are set

at no less than the value ascertained by such an appraisal. The trial court allowed petitioners to intervene as intervenor-defendants, and a defendant class of parties was certified by the trial court as consisting of those holding or likely to hold mineral leases on state lands received from the federal government.

The trial court granted petitioners' motion for summary judgment on the ground that the challenged Arizona leasing statute does not violate the Arizona Enabling Act, as amended, or its rescript in the Arizona Constitution. On appeal the federal claim was appropriately preserved and the case was transferred from the court of appeals directly to the Supreme Court of Arizona because of the substantial importance of the issues presented. (P. 3a, below.) In a split decision, that court reversed and held that the Enabling Act of 1910 invalidates the state statute.

The Supreme Court of Arizona concluded that language in the Jones Act of 1927 stating that the grant of mineral lands to the western states "shall be of the same effect as prior grants" implicitly incorporated all of the restrictions on the use and disposition of school lands that the Enabling Act had imposed on the state with respect to nonmineral lands and surface assets. (P. 9a, below.) In addition, in the court's view, the "dramatic revisions" of the 1951 amendments to the Enabling Act "greatly reinforce[d]" that conclusion because they showed that Congress in 1951 did not believe that the Jones Act of 1927 had passed mineral lands to the states free of the conditions that govern lands granted by the state's enabling act. (P. 18a, below.) Finally, the court found "fully dispositive" of the mineral leases involved in this case language in this Court's decision in *Alamo Land & Cattle Co.* v. *Arizona*, 424 U.S. 295 (1976), which states that the leasing of agricultural lands granted to the State of Arizona by the Enabling Act of 1910 is subject to prior appraisal and to disposition at no less

than the appraised value under Section 28 of that act. (P. 22a, below.)

The Supreme Court of Arizona declared the Arizona royalty statute "void" as repugnant to Section 28 of the 1910 Enabling Act and its rescript in article 10 of the Arizona Constitution [1] and remanded the case to the trial court to enter judgment and determine the proper relief. (Pp. 27a, 29a, below.)

Justice Cameron dissented on the ground that Congress "in plain words" had authorized Arizona to lease state mineral lands in such a manner as its legislature might direct in both the Jones Act of 1927 and the 1936 and 1951 amendments to the Enabling Act of 1910. The dissenting Justice noted that, "[b]ecause mineral lands were reserved to the federal government under the Enabling Act, Congress could not have contemplated their inclusion" in the restrictions on the state's leasing of nonmineral lands and surface assets in Section 28 of the Enabling Act of 1910. He further observed that subsequent legislative events showed congressional affirmation of the states' sole authority over the leasing of school lands that contain mineral deposits. (P. 32a & n.2, below.) He also noted the considerable practical difficulties of imposing a prior appraisal and auction regime on mineral deposits, which are "almost impossible to value until after extensive and often expensive exploration." (P. 35a, below.)

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[1] The Enabling Act of 1910 requires that the terms and conditions imposed on Arizona with respect to school lands shall be incorporated in the state's constitution and may not be abrogated without the consent of Congress. Pub. L. No. 219 (ch. 310) § 20, 36 Stat. 569, 570-71. Accordingly, the terms of Section 28 of the Enabling Act of 1910 are rescripted in article 10 of the Constitution of the State of Arizona. The court's ruling below relied exclusively on its interpretation of the federal Enabling Act and the Jones Act and not on any independent and adequate state ground. *See* pp. 4a-24a, below; Michigan v. Long, 463 U.S. 1032, 1037-44 (1983).

REASONS FOR GRANTING THE WRIT

The court below, in declaring void a course of action followed by Arizona for almost fifty years in realizing on the value of the mineral deposits in its lands, has decided a federal question of substantial importance not only to Arizona but to other western states. It has decided the question in a way that subordinates Arizona's sovereign choice of how to manage its resources and support its schools to a supposed federal policy derived from sources that are, at best, uncertain and ambiguous. The decision of the Arizona Supreme Court on the question is in conflict with a decision of the Supreme Court of Utah. The issue of federal-state relations raised by the two decisions has not been, but should be, settled by this Court.

1. In *Jensen* v. *Dinehart*, 645 P.2d 32, 35 (Utah 1982), the Supreme Court of Utah held that, insofar as mineral leasing is concerned, the purpose of the Jones Act of 1927 was to "free[] . . . federally granted school sections . . . from any restriction or limitation that may have theretofore existed, except as to use for public schools." The question in that case was whether the proceeds of mineral leases of school lands had to go into a perpetual school fund with interest only used currently, as the Utah Enabling Act required with respect to lands it granted to the new state; or, as the Jones Act of 1927 permits, the proceeds themselves could be used currently for school purposes. In deciding that the Jones Act provisions governed, the Supreme Court of Utah reasoned that Congress had not intended to convey mineral lands to Utah by the enabling act. Those lands were conveyed by the Jones Act, which left Utah "[a]s a sovereign state . . . free and unfettered" to manage its mineral leasing program for the support of its public schools unencumbered by the highly restrictive provision of the enabling act that governed proceeds from nonmineral school lands and surface assets. That was true

even though title to some mineral lands had passed to the state inadvertently under the state's enabling act when the mineral nature of the land was unknown at the time title vested. 645 P.2d at 35. Therefore, the proceeds from state mineral leases could be deposited into the state's currently expendable school fund and need not go into the state's perpetual school fund.

The precise question in the Utah case was different, but the governing issue was the same as that decided by the court below in this case: whether provisions in the individual states' enabling acts, which implicitly or explicitly excepted mineral lands from the grants of school lands, limit the leasing of mineral lands. The decision of the court of last resort of the State of Utah is in conflict with the decision of the court below on that issue.

2. The decision of the court below creates uncertainties in the management of state lands in other western states. The Jones Act of 1927 granted mineral lands principally to eleven western states: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. *See* S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926). The enabling acts for those states contain various restrictions on the states' use and disposition of nonmineral school lands.[2] If followed by other courts, the holding that the Jones Act implicitly imposes those restrictions on a state's leases of its mineral lands could have an unsettling effect on state leasing systems in those states that since 1927 have looked to the Jones Act rather than their enabling acts as the source of their mineral leasing authority.

In Arizona alone the decision of the court below affects vast amounts of mineral lands that have been developed

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[2] *E g.*, Pub. L. No. 199 (ch. 656) § 5, 26 Stat. 215, 216 (1890) (Idaho); Pub. L. No. 52 (ch. 180) § 11, 25 Stat. 676, 679-80 (1889) (amended 1932, 1948) (Montana and Washington).

or are now being explored under leases issued to private companies pursuant to the voided state statute. Because much of the land in Arizona is arid, Congress granted to Arizona four sections of land in each township instead of the one or two sections that it had given to many of the earlier public-land states, *see* 68 Cong. Rec. 1824 (1927), and as a result about one tenth of Arizona's acreage is state-owned school land and a significant amount is mineral in character. Mining companies have made sizeable investments in the exploration and development of those state mineral lands under the state mineral leasing statute passed almost fifty years ago. During that time the United States has never contested Arizona's manner of leasing its mineral lands even though the Attorney General of the United States is specifically authorized to enforce the land-grant terms of both the Enabling Act of 1910, § 28, 36 Stat. 574, 575, and the Jones Act of 1927, 44 Stat. 1026, 1027. The erroneous view of those laws espoused by the Supreme Court of Arizona upsets years of settled private expectations and unravels longstanding state policy with respect to vast quantities of state-owned lands in Arizona.

3. The decision of the court below curtailing the power of the State of Arizona to manage its own mineral lands for the benefit of its schools is not warranted by the relevant acts of Congress. The Jones Act, the only express grant of mineral lands to Arizona (and the other western states), expressly permits the state to lease mineral deposits "as the State legislature may direct," provided only that the "proceeds of rentals and royalties" from such leases are used to support the state's public schools and that the mineral deposits are reserved to state ownership. Pub. L. No. 570 (ch. 57), 44 Stat. 1026-27 (1927).

The Arizona Supreme Court's strained construction of the Jones Act as incorporating all of the original

Enabling Act's appraisal, fair-value and auction restrictions and making them applicable to mineral leases rests on Congress' prescription in the Jones Act that "[t]he grant of numbered mineral sections under this [Act] shall be of the same effect as prior grants" of nonmineral sections. 43 U.S.C. § 870. But that is clearly a reference to the nature of the actual grant of land—that is, the type of property interests conveyed to the state. If more had been intended, Congress would not have needed to specify as it did in the Jones Act that the proceeds of mineral leases must be "utilized for the support or in aid of the common or public schools." Every relevant enabling act was already to that "same effect."

The Utah Supreme Court held that the provisions of the Jones Act governed both lands withheld from Utah because they were known to be mineral at the time of the statehood grant and mineral lands that, under *Wyoming* v. *United States*, 255 U.S. 489 (1921), passed inadvertently, their mineral content undiscovered at the time of that grant. In the case of Arizona, it does not matter whether the Jones Act covers the latter category of mineral lands. The Arizona provisions of the New Mexico-Arizona Enabling Act have been amended to accord with the Jones Act and to relieve mineral leases of the restrictive appraisal, fair-value, and auction requirements applicable to the disposition of lands granted by the original act.[3]

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[3] The same result was achieved for New Mexico by means of a joint resolution of Congress in 1928 that authorized an amendment of the constitution of New Mexico to allow leasing of state mineral lands "under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding and containing such terms and provisions, as may be provided by act of the [state] legislature," provided that the state used the rents and royalties from the mineral lands to support its public schools. Pub. Res. No. 7 (ch. 28), 45 Stat. 58 (1928). A 1922 decision of the New Mexico Supreme Court, Neel v. Barker, 204 P. 205 (N.M. 1922), had held that because the En-

In 1936, paragraph three of Section 28 of the Enabling Act was amended to allow Arizona to lease lands for mineral purposes for up to twenty years "in a manner as the State legislature may direct." Pub. L. No. 658 (ch. 517), 49 Stat. 1477-78. In 1951, the third paragraph was again rewritten, but to the same effect: "Nothing herein contained shall prevent . . . the leasing of any of [the lands referred to in this section], in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes . . . for a term of twenty years or less." Pub. L. No. 44 (ch. 120), 65 Stat. 51, 52. The "nothing herein contained" phrase of the 1951 amendment (also used in the 1936 amendment) encompasses all of the provisions of Section 28—including the requirement of sale or lease at no less than appraised value in the fourth paragraph as well as the advertising and bidding requirements of the third paragraph—because Section 28 is a unified whole without separately numbered paragraphs and because there are several instances in which Congress in Section 28 used the word "herein" indisputably to refer to materials in other paragraphs within that section. *See, e.g.*, Section 28, ¶¶ 1 & 11.

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abling Act of 1910 had not intended to grant mineral lands to the state, if any such lands passed to the state inadvertently, those lands were not subject to the Act's requirements of prior appraisal, public auction and sale at no less than the appraised value. The joint resolution of Congress approved of that view of the state's authority to lease mineral lands under the Enabling Act.

The New Mexico resolution related only to lands "granted or confirmed" by the Enabling Act of 1910 and did not contain any reference to the mineral lands that had been granted to the state by the Jones Act of the preceding year. The 1928 Congress apparently believed it self-evident that the state had wide latitude in the manner of leasing mineral lands granted to it by the Jones Act and that no such resolution was needed with respect to those lands. Its action was prompted only by lingering uncertainty about whether the Enabling Act's restrictions on leases applied to mineral lands that had passed inadvertently under the land grant of 1910. *See* S. Rep. No. 90, 70th Cong., 1st Sess. 2-3 (1928).

The legislative history of both the Jones Act and the amendments to the Enabling Act confirms that Congress recognized the distinct nature of mineral deposits as opposed to surface assets and that it intended to entrust the leasing of state mineral lands to state legislatures. Historically, it was the "practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines." *United States* v. *Sweet*, 245 U.S. 563, 567 (1918). Because Congress did not mean to convey any mineral lands to Arizona when it passed the Enabling Act of 1910, it had no occasion at that time to consider what conditions, if any, on the state's disposition of mineral lands would be appropriate in order to foster desirable levels of exploration and mining investments and at the same time generate sufficient revenues for the state's public schools.

Congress did focus on this issue in 1927 and in the Jones Act made a specific new federal grant of mineral lands to the states. The history of the Jones Act shows that Congress did not intend the federally imposed disposition requirements of each grantee state's enabling act to govern the new grant of mineral lands. On the contrary, the view that prevailed in Congress was that each state should assume full control over the leasing of state mineral lands. Congressman Sinnott, chairman of the House Public Lands Committee, testified that "in these days the State legislatures can be depended upon to be just as zealous and just as jealous of the public school fund as the Federal Government can be." *Hearings on S. 564 Before the House Comm. on Rules*, 69th Cong., 2d Sess. 6 (1926), and Congressman Morrow of New Mexico similarly stated in debate that "[t]he placing of the mineral rights in charge of the States will bring to each State an immense school fund if each State will in turn use business judgment." 68 Cong. Rec. 1820 (1927). The Senate committee report accompanying the bill stated that all of the eastern states

held their lands outright without reservation, that Congress had given eight other states their minerals and that therefore placing mineral lands "in the hands of" the western states from whose school-land grants mineral lands had been excluded was necessary to put them on an "equal basis with the original States." S. Rep. No. 603, 69th Cong., 1st Sess. 6 (1926).

Congress saw practical reasons as well for not encumbering the grants of mineral-bearing lands with the restrictions applicable to other school lands. In discussing title problems that had arisen under the states' enabling acts, the Senate committee report noted that the mineral character of land often is unknown or purely speculative until "extensive and expensive exploration work has been carried on" or until "science has developed a new process making valuable a deposit which theretofore had no value." *Id.* at 5. Mineral extraction also poses special concerns about the proper balance of conservation and development, *e.g.*, *Hearings*, *supra*, at 6, 9, 11, 16, 21 (1926), and those factors require a separate regulatory regime, which Congress expressly entrusted to state legislatures.

The subsequent amendments to the Enabling Act confirm the clear intent of Congress in 1927 to grant state legislatures the right to lease mineral lands free of the restrictions imposed upon the disposition of nonmineral lands. The Senate and House committee reports on the 1936 amendment to Section 28 authorizing Arizona to lease mineral lands for up to twenty years "in a manner as the State legislature may direct," referred to letters from the Department of the Interior as stating the reason for the amendment. Those letters observed that "[t]here is *no provision* in the Enabling Act for the development or protection of minerals" on school lands while the Jones Act, which had granted mineral lands to the state, permitted the state legislature to direct the manner of leasing mineral deposits. S. Rep. No. 1939,

74th Cong., 2d Sess. 2 (1936) (emphasis added). The letters concluded that the purpose of the amendment was to fill a void that may have existed within the Enabling Act with respect to mineral lands granted inadvertently under the Enabling Act by harmonizing that earlier act with the liberal mineral leasing regime of the Jones Act. *Id.* at 2-3. *See also* H.R. Rep. No. 2615, 74th Cong., 2d Sess. 2-3 (1936).

The purpose of the further 1951 amendment of the Enabling Act was to encourage large-scale development of oil and gas by permitting leases of indefinite duration. The amendment permitted leasing of oil and gas substances for up to twenty years "and as long thereafter" as hydrocarbons could be procured in paying quantities. Mineral leases continued to be limited to twenty years and, as we have seen, the language conferring on the Arizona legislature discretion in making such leases was slightly revised: leasing was authorized "in such manner as the Legislature of the State of Arizona may prescribe." Pub. L. No. 44 (ch. 120), 65 Stat. 51, 52 (1951).

The indefinite oil and gas leases that the 1951 amendment authorized could be regarded as sales instead of leases, and Congress expressly exempted such leases from any requirements of prior appraisal, advertising and public bidding. That difference in the treatment of hydrocarbons and other mineral deposits does not alter the fact that Congress intended to liberalize and not to constrain the powers of Arizona to lease school lands when it amended the Enabling Act in 1936 and 1951. Those amendments do not derogate from the discretion that the Jones Act of 1927 delegated to the state in the leasing of mineral lands. The Arizona Supreme Court was mistaken in viewing the 1951 revision as reinforcement for its mistaken belief that the Jones Act incorporated the restrictions of the original Section 28. At most that revision reflects a concern on the part of Con-

gress that leases of indefinite duration, found necessary for realization on oil and gas deposits, differed so markedly from the usual lease of other mineral deposits that they merited express exemption. The revision leaves usual leases of other mineral deposits subject to the discretion of the legislature under the Jones Act and the Enabling Act as first amended in 1936.

The amended Section 28 applies only to lands granted in 1910 and not to lands granted by the Jones Act. Whether required to do so or not, however, Arizona limits all of its non-hydrocarbon mineral leases to twenty years, as the amended Section 28 prescribes. Ariz. Rev. Stat. Ann. § 27-235(A). There is no principled basis on which it can be held that restrictions imposed earlier on dispositions of nonmineral lands modify the leasing discretion that Congress expressly granted the states when it conveyed mineral lands to them in the Jones Act and later confirmed in amendments to the original Enabling Act.

4. The court below chose to ignore the express language of the Jones Act and the amended Section 28 in concluding that an "explicit" release was needed to free Arizona from the restrictions on the disposition of granted lands that Congress in 1910 had imposed with respect to nonmineral lands and surface assets. The "same effect" language that it relied upon to impose the surface assets limitations of the 1910 act upon the mineral leasing regime authorized by Congress in 1927 simply will not bear the heavy weight placed upon it by the court below. The lower court's approach to statutory construction is inappropriate in any circumstance but is particularly mischievous in resolving an issue of federal-state relations.

Management of its fiscal affairs and its land is a central attribute of state sovereignty, and the education of school children lies at the heart of a state's services for its citizens. Having the power to set policy for those

state functions "is what gives the State its sovereign nature." *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982). This Court has repeatedly held that when Congress purports to limit a state as state in areas such as those, Congress must make its intention unmistakably clear. In *Pennhurst State School and Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981), this Court refused to read a federal statute enacted under Congress' spending power as imposing certain federal conditions on a state based on mere "innuendo" in the statute's text and its legislative history. This Court stated that when Congress intends to impose conditions on a state "it must do so unambiguously." *Id.* Likewise in *United States* v. *Bass*, 404 U.S. 336, 349 (1971), this Court held that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance," and for that reason the Court in that case resolved an ambiguity in a federal statute in favor of the state.

When federal conscription of a state is based on the authority of the federal government to attach conditions to federal grants under Congress' spending power, the clear statement rule ensures that a state is informed of rights it will cede by choosing to accept the largess of the federal government so that the compact between the federal and state sovereigns will be truly voluntary. *See Pennhurst*, 451 U.S. at 25. Like a federal grant under the spending power, a "school land grant [is] a 'solemn agreement'" between the states and the federal government involving concessions on both sides, *Andrus* v. *Utah*, 446 U.S. 500, 507 (1980), and the rule of statutory construction requiring an unmistakably clear expression of congressional intent to impose conditions on the states must also apply to Congress' regulation of a state under the property clause. Conditions may not be imposed based on speculative implications from ambiguous text.

5. Finally, to the extent that the court below thought that this case was controlled by this Court's decision in *Alamo Land and Cattle Co.* v. *Arizona*, 424 U.S. 295 (1976), the court was plainly mistaken. *Alamo* involved the proper distribution of compensation for federal condemnation of state school lands. This Court held that a lessee could have a compensable interest in such lands and remanded for a determination whether the lessee had a valid lease from the state and if so how that lease should be evaluated. In so ruling this Court stated that rentals of grazing land at less than the land's appraised value were prohibited by Section 28 of Arizona's Enabling Act and that a lease at less than the appraised value would not entitle the holder of the lease to compensation upon condemnation. 424 U.S. at 311. The opinion does not mention the language in the amended Section 28 that permits Arizona to make grazing leases "in such manner as the Legislature of the State of Arizona may prescribe." Moreover, the Court had no occasion to consider the Jones Act of 1927, which has no application to grazing lands but is the source of the mineral leasing authority expressly granted to Arizona and other western states. Only this Court can authoritatively clarify the relevance of the *Alamo* decision to the issue presented in this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 8, 1988

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

No. CV-86-0238-T

Court of Appeals No. 1 CA-CIV 8616

Maricopa County Superior Court No. C-433745

FRANK and LORAIN KADISH; MARION L. PICKENS; and the ARIZONA EDUCATION ASSOCIATION, a non-profit corporation, *Plaintiffs-Appellants,*

v.

ARIZONA STATE LAND DEPARTMENT, an agency of the State of Arizona; JOE T. FALLINI, in his capacity as the State Land Commissioner; and CYPRUS PIMA MINING COMPANY, on behalf of itself and others similarly situated, *Defendants-Appellees,*

ASARCO Incorporated, a New Jersey corporation; MAGMA COPPER COMPANY, a Delaware corporation; JAMES P. L. SULLIVAN, ESQ.; EISENHOWER MINING COMPANY, a partnership; and CAN-AM CORPORATION, an Arizona corporation, *Intervenors-Appellees.*

[Filed Dec. 10, 1987]

Appeal from the Superior Court of Maricopa County
The HONORABLE JOHN STICHT, Judge

REVERSED AND REMANDED

FELDMAN, Vice Chief Justice

Frank and Lorain Kadish, Marion Pickens, and the Arizona Education Association, petitioners, brought a taxpayers' action against the Arizona State Land Department and others. The issue raised is whether the fixed royalty provisions of A.R.S. § 27-234(B), permitting the land department to lease minerals on a flat rate royalty, violate the appraisal and true value provisions of the Arizona Enabling Act and the comparable provisions of the state constitution.

FACTS AND PROCEDURAL BACKGROUND

The individual petitioners are taxpayers who allege that their taxes support public education in Arizona. The Arizona Education Association represents approximately 20,000 public school teachers throughout the state. All petitioners contend that the provisions of A.R.S. § 27-234(B),[1] fixing a flat rate, five percent royalty on min-

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[1] *Every mineral lease of* [illegible] *land shall provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim.* The net value is deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production of the minerals. In case of minerals not processed for commercial use, the net value is the gross proceeds, or gross value, at the place of sale or use, less the actual costs of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production of the minerals. The lease shall not require the payment of any royalty in advance of actual production of minerals from the claim.

A.R.S. § 27-234(B) (Supp. 1987) (emphasis added).

erals extracted from leased state school trust land impermissibly result in the extraction of minerals without payment of full value to the school trust. Petitioners claim that such a limitation of income is contrary to the appraisal and true value requirements of the Enabling Act and the Arizona Constitution. They seek a declaration that A.R.S. § 27-234(B) is void and ask for appropriate special action relief.[2]

The defendants originally named were the Arizona State Land Department, the State Land Commissioner, and Cyprus Pima Mining Company, a mineral lessee. The trial court allowed other mineral lessees of state school trust lands (Magma Copper Company, ASARCO, Inc., James Sullivan, Eisenhower Mining Company, and Can-Am Corporation) to intervene as defendants. (Original and intervenor defendants are hereafter referred to as "respondents.") The trial court eventually certified the case as a defendant class action pursuant to Rule 23, Ariz.R.Civ.P., 17 A.R.S. The class consists of all present and future mineral lessees of state lands.

The parties filed cross motions for summary judgment. The trial court granted respondents' summary judgment motions, and held A.R.S. § 27-234(B) did not violate the Arizona Enabling Act or the Arizona Constitution. Petitioners timely moved for an order transferring the case from division one of the court of appeals to this court. We granted the motion because the issues in this case are matters of first impression and substantial statewide importance. *See* Rule 19, Ariz.R.Civ.App.P., 17A A.R.S. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5, A.R.S. §§ 12-102, -2103, and Rules 8 and 9, Ariz.R.P.Spec.Act., 17A A.R.S. We now reverse the judgment below, and remand with instructions to enter summary judgment in favor of petitioners.

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[2] In Arizona, relief formerly obtained by writs of prohibition, mandamus or certiorari is now obtained by "special action." Rule 1, Ariz.R.P.Spec.Act., 17A A.R.S.

HISTORICAL BACKGROUND OF THE ARIZONA ENABLING ACT

The issue before us can neither be understood nor resolved without an understanding of the historical process from which it evolved. In 1910, the Arizona-New Mexico Enabling Act became law, authorizing the people of the territories of Arizona and New Mexico to form state governments. Act of June 20, 1910, Pub.L.No. 219 (ch. 310), 36 Stat. 557. Sections 19 through 35 of the Act referred exclusively to the proposed state of Arizona.[3] The Enabling Act included provisions that confirmed prior land grants to the Arizona Territory and granted still more land to the new state. In 1911, the Arizona electorate accepted the land grants by ratifying art. 10, § 1 of the Arizona Constitution. The full provisions of the Enabling Act became part of the organic law of this state. Ariz. Const. art. 20, ¶ 12. *See also Gladden Farms, Inc. v. State*, 129 Ariz. 516, 518, 633 P.2d 325, 327 (1981). Because federal law is supreme in this field, neither this court, nor the legislature, nor the people may alter or amend the trust provisions contained in the Enabling Act without congressional approval. *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336 (1947).

Pursuant to the Enabling Act, the United States granted four sections of land in each township to Arizona. Almost ten million acres were granted. The land could be used *only* for the support of the common schools of the state (school trust lands) and for internal improvements to the state. *See generally* Dunipace, *Arizona's Enabling Act and the Transfer of State Lands for Public Purposes*, A ARIZ.L.REV. 133 (1966). The school land trust now encompasses approximately nine and one-half million acres. AUDITOR GENERAL, A PERFORMANCE AUDIT OF THE STATE LAND DEPARTMENT, at 2 (1987).

[3] Unless specifically stated to the contrary, all future references in this opinion to the Enabling Act pertain to the Arizona Enabling Act.

Section 28 of the Enabling Act prohibited the sale, conveyance, or encumbrance of any part of the school trust land "except to the highest and best bidder at a public auction" after notice "duly given by advertisement." The state could dispose of the land or its products only if it obtained "true value" as determined by a prior appraisal. No disposal could be made "for a consideration less than the value so ascertained." Finally, § 28 provided that every disposition of the land or its products "not made in substantial conformity with the provisions of this Act [would be] null and void, any provisions of the consitution or laws of the said State to the contrary notwithstanding." Except for several matters irrelevant to the case before us, art. 10 of the Arizona Constitution is "pracically a rescript of section 28 of the Enabling Act." *Murphy*, 65 Ariz. at 348, 181 P.2d at 342.

Murphy capsulizes the historical reasons for the stringent provisions of the Enabling Act. Land grant acts similar to our Enabling Act previously had authorized the formation of other state governments. These acts had given the new states authority to determine how school trust lands were to be sold and the proceeds preserved for trust purposes. The result of this largess was highly unsatisfactory:

> The sad experience of Congress with the handling by these twenty-three states of the granted lands, the sale thereof, and the investment of monies derived from a disposition of the granted lands, brought about a new policy which found expression in the Enabling Act for New Mexico and Arizona. The dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, left a scandal in virtually every state, and these granted lands and the monies derived from a disposition thereof were so poorly ad-

> ministered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of experiences of the past, that such would not occur in the new states of New Mexico and Arizona.

Murphy, 65 Ariz. at 351, 181 P.2d at 344.

To ensure that Arizona and New Mexico would not dissipate the assets granted, Congress required that they hold the granted land in trust and enacted the restrictive provisions of § 28 of the Enabling Act noted above. 65 Ariz. at 351-52, 181 P.2d at 344-45, citing the report of Senator Beveridge, Chairman of the Committee on Territories, S. Rep. No. 454, 61st Cong., 2d Sess. (1910). *See also* 45 Cong. Rec. 8227 (1910) (explanation by Senator Beveridge in floor debate concerning strict safeguards on land transferred to the state of Arizona).

Congress's concerns were well-founded. New Mexico's experience was sadly typical. Despite the stringent trust restrictions of its Enabling Act, the New Mexico legislature enacted laws permitting the disposition of trust assets in a manner that breached the trust. *See, e.g., Ervien v. United States*, 251 U.S. 41, 40 S.Ct. 75 (1919). In Arizona, the legislature authorized the investment of school trust funds in first mortgages upon supposedly valuable reclaimed farm land. These speculative expenditures were at best "non-beneficial." *See Murphy*, 65 Ariz. at 357, 181 P.2d at 348. The legislature eventually had to compensate the trust fund for the resulting losses by appropriating money out of the general fund. *See Udall v. State Loan Board*, 35 Ariz. 1, 273 P. 721 (1929); Laws of 1929, ch. 94.

Thus, the general intent of Congress is clear. It intended the Enabling Act to severely circumscribe the power of state government to deal with the assets of the common school trust. The duties imposed upon the state were the duties of a trustee and not simply the duties of a good business manager. *See generally County of*

Skamania v. State, 102 Wash.2d 127, 685 P.2d 576 (1984) (when managing and administering the trust lands, the state must comply with the same fiduciary obligations as apply to a private trustee). The grant in trust was intended to curb the power of the state to deal with the trust lands in the "prophetic realization, . . . that the state might [otherwise be] lured from patient methods to speculative advertising . . . in the hope of a speedy prosperity." *Ervien*, 251 U.S. at 47-48, 40 S.Ct. at 76. Thus, to comply with congressional intent, we must strictly apply the Enabling Act's restrictions regarding disposal of school trust assets.

With these principles in mind, we turn now to the specific provisions in the Enabling Act as originally adopted and as amended from time to time by Congress.

TREATMENT OF MINERAL LANDS UNDER THE ENABLING ACT AND ITS AMENDMENTS

A. *The Enabling Act as Originally Drafted*

Section 24 of the original Enabling Act excluded mineral lands from the initial grant to the state, but allowed the state to select "indemnity" sections in lieu of those lands. Thus, under the provisions of the original act, title to "known" mineral lands did not vest in the state, even though the land might have been one of the sections described in the grant. *See United States v. Sweet*, 245 U.S. 563, 38 S.Ct. 193 (1918). This exclusion created some difficultly as two types of mineral lands emerged. The first were lands "of a known mineral character at the time the initial grant vested in the states," while the second consisted of land "not known to be mineral in nature at the time of vesting, but upon which minerals were subsequently discovered." Note, *State Mineral Leases on Arizona School Lands*, 15 ARIZ.L.REV. 211, 219 (1973); *see also West v. Standard Oil Co.*, 278 U.S. 200, 49 S.Ct. 138 (1929). The United States Supreme Court

construed the grant to mean that states acquired vested rights in all school trust sections not known to be mineral at the time of the grant. The rights thus acquired were not defeated by subsequent mineral discovery. *Wyoming v. United States*, 255 U.S. 489, 41 S.Ct. 393 (1921). Because of the mineral land exclusion, however, title to the school grant lands which theoretically vested in the state at the time Arizona was admitted to the Union could be defeated if an adverse claimant established that at the time of admission the lands were known to be mineral lands. This dilemma was recreated in each of the other eleven western land grant states having mineral land exclusions in their respective enabling acts. *See* Report of Rep. Sinnott, Chairman of the Committee on Public Lands, House Hearings on S.Rep. No. 1761, 69th Cong., 2d Sess., at 2 (1926). *See also* 68 Cong.Rec. 1815-17, 1820-24, 2581 (1927) (floor debate on reasons for amendment of enabling acts). Of course, this situation left title to large tracts of land unsettled.

B. *The Jones Act of 1927*

To remedy this problem, Congress ultimately confirmed the entire school land grant to the western land grant states, regardless of the known or unknown mineral character of the land. *See* Act of Jan. 25, 1927, Pub.L. No. 570 (ch. 57), 44 Stat. 1026 ("Jones Act"). The Jones Act solved the vesting problem regarding mineral lands and required the western land grant states to reserve the mineral rights or any lands sold. It also gave the states authority to lease mineral deposits. The Jones Act made absolutely no mention of the Arizona Enabling Act provisions requiring disposition of school trust lands only after notice, advertisement, public auction, and sale to the highest bidder. More significantly, it also left untouched the provisions providing for appraisal and for sale for true value at not less than the appraised price. But, in prohibiting the outright sale of mineral lands

except with a royalty reservation, and in permitting lease of "coal and mineral deposits," the Jones Act further provided that such deposits "[should] be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools."

C. *Do Disposal Restrictions Apply to Mineral Lands?*

Respondent Magma contends that lease of mineral deposits was never covered by the disposal restrictions of § 28 of the Enabling Act, and to this day has not been included within those restrictions. This argument is only half correct. The Enabling Act of 1910 did not cover mineral leases simply because, under the grant, Arizona was not supposed to receive any mineral lands. However, that changed dramatically in 1927 when, by the Jones Act, Congress confirmed the vesting of *all* lands encompassed by the original grant of numbered sections to Arizona and the other land grant states. The Jones Act stated:

> [T]he several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character . . . . (a) *That the grant of numbered mineral sections* under this Act *shall be of the same effect as prior grants for the numbered nonmineral sections*, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

Pub.L. No. 570, 44 Stat. 1026 (1927) (emphasis added).

The quoted language indicates a clear intent that nonmineral lands that had vested under the prior land grant acts together with the mineral sections vesting under the

Jones Act should be held for the school trust purposes and under the same trust and dispositional restrictions as the vested nonmineral sections. Arizona, along with the other eleven land-grant states, could not hold its mineral lands in the same way (to "the same effect") as its nonmineral lands.

The language of the 1910 Enabling Act had imposed restrictions on disposition of school trust land expressly applicable to "[a]ll lands, leaseholds, timber, and other products of land." Enabling Act, § 28. That statute further stated that the "[d]isposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom . . . in any manner contrary to the provisions of this Act, shall be deemed a breach of trust." *Id.* We believe these words accomplished just what the text clearly states: all land vesting in the school trust and all products of the lands were subject to the trust's dispositional restrictions. *See, e.g., Farmers Investment Co. v. Pima Mining Co.*, 111 Ariz. 56, 523 P.2d 487 (1974) (groundwater); *Department of State Lands v. Pettibone*, 702 P.2d 948, 954-56 (Mont. 1985) (groundwater and surface water rights). Thus, when Arizona obtained full vesting of mineral lands through the Jones Act in 1927, the dispositional restrictions and provisions of the 1910 Enabling Act became applicable to both the original lands and newly-acquired and vested mineral lands.[4]

D. *The 1936 and 1951 Amendments*

Congress amended § 28 of the Enabling Act, in part again to clarify mineral lease problems, by the Act of June 5, 1936 (Pub.L. No. 658 (ch. 517), 49 Stat. 1477), which provided for the lease of mineral lands for a term

[4] *See also Jensen v. Dinehart*, 645 P.2d 32, 37 (Utah 1982) (Oaks, J., concurring and dissenting) ("There are no words in the Jones Act or its legislative history that exhibit any intent to remove or modify the trust restriction Congress had imposed on sections granted under the Enabling Act.").

of twenty years or less, and permitted leasing of agricultural and grazing land "in a manner as the State legislature may direct." The Enabling Act was again amended by the Act of June 2, 1951 (Pub.L. No. 44 (ch. 120), 65 Stat. 50) to provide that nothing in § 28 (which contained the restrictions on disposition of school lands):

> shall prevent: . . . 2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes, . . .

Pub.L. No. 44 (ch. 120), 65 Stat. 50, 50 (1951). The 1951 amendment did remove the advertisement, bidding, and appraisal requirements for leases of hydrocarbon minerals, but it did not specify any changes in the leasing provisions for other types of minerals.

E. *The Current Version of the Enabling Act*

As the result of the amendments described above, the current version of § 28 of the Enabling Act (and basically of the Arizona rescript, art. 10, §§ 1, 3, and 4) reads as follows in relevant part:

> That it is hereby declared that *all lands* hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, *shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided* and for the several objects specified in the respective granting and confirmatory provisions, *and that the natural products and money proceeds of any of said lands shall be subject to the same trusts* as the lands producing the same.
>
> * * * *
>
> *Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction* . . . notice of which public auction

shall first have been duly given by advertisement [there follows numerous specifications for the contents and manner of publication of the advertisement] . . . . *Nothing herein contained shall prevent*: (1) the leasing of any of the lands referred to in this section, *in such manner as the Legislature of the State of Arizona may prescribe*, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) *the leasing of any said lands, in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes*, other than for the exploration, development and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands . . . for the exploration, development and production of oil, gas and other hydrocarbon substances . . . the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production . . . .

> *All lands, leaseholds*, timber *and other products* of land, before being offered, *shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained* . . . .

(emphasis added).

THE CENTRAL ISSUE

In this court, respondents have focused their argument on the issue we believe is central to the case. Respondents rely on the phrase that first appeared in 1927 as part of the Jones Act amendment and which was basically continued in the subsequent amendments of 1936 and

1951. The pertinent language now states that nothing in § 28 of the Enabling Act shall prevent "the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe . . . for mineral purposes . . . for a term of twenty years or less." The respondents contend that these words give Arizona "full authority to set the terms of 20 year mineral leases, including the establishing of royalty rates, without the appraisement, advertising and bidding process . . . ." Answering Brief of Cyprus, ASARCO, and Eisenhower, at 8.

Thus, they conclude that A.R.S. § 27-234(B), which permits leases at a flat rate "royalty of five per cent of the net value of the minerals produced from the claim," is a proper exercise of the power given the state legislature, even if such a flat rate, statutory royalty results in some leases being made for less than the "true value" of the royalty interest.

A. *Congressional Intent*

To resolve this central issue, we now examine the intent of Congress with respect to the wording upon which respondents rely. The original Enabling Act contained the prohibitions already discussed, but provided for one exception: that "nothing herein contained shall prevent said proposed state from leasing any of said lands . . . for a term of five years or less without said advertisement herein required." Act of June 20, 1910, Pub. L. No. 219, § 28, 36 Stat. 557. The 1927 Jones Act, passed to resolve the mineral land title problem, for the first time permitted the lease of mineral sections "as the State legislature may direct." Pub. L. No. 570, 44 Stat. 1026. The 1936 act changed the wording to read that "nothing . . . shall prevent said State of Arizona from leasing in a manner as the State legislature may direct, any of said lands . . . for grazing and agricultural purposes for a term of ten years or less, or . . . for mineral purposes

[including oil and gas leases] for a term of twenty years or less." Act of June 5, 1936, Pub. L. No. 658 (ch. 517), 49 Stat. 1477.

Respondents contend that Congress intended the language used in the 1927 and 1936 amendments to permit the state to deal with mineral deposits on school trust lands in an unrestricted manner. We disagree for several reasons. First, an amendment ought not to be interpreted so broadly as to destroy the entire objective of the statutory scheme. Permitting disposal of vast mineral deposits at less than true value is completely contrary to the objectives sought by the restrictive wording of other portions of the Enabling Act. As the Oklahoma Supreme Court indicated in considering a similar problem, "[c]ommon sense dictates" against finding such an inexplicable congressional intent in dealing with mineral deposits. *Oklahoma Education Association v. Nigh*, 642 P.2d 230, 237 (Okla. 1982) (court construed the Oklahoma enabling act provision which permitted leasing of trust lands "under such rules and regulations as the Legislature . . . may prescribe" as giving the legislature authority only to enact provisions designed to achieve the trust objectives of protection and maximum return of assets).

We should not interpret these amendments so that a "potentially self-defeating incompatability exists between the stated purpose and objective of the trust on the one hand, and the alleged unbridled authority granted the State Legislature to defeat that strategy by means of creative rules and regulations on the other hand." *Id.*; *see also State Land Department v. Tucson Rock & Sand Co.*, 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970) (the phrase "such manner as the legislature may direct" does not permit disposal free from § 28 restrictions, but merely gives the legislature authority to regulate the manner in which the lease is made and to set lease terms

that do not conflict with § 28), *vacated on other grounds*, 107 Ariz. 74, 481 P.2d 867 (1971).

We believe there is a rational and consistent explanation for the congressional amendments. As we have noted, the Jones Act was intended to resolve the title vesting problems inherent with mineral lands in the original grant to Arizona and other western states. It was also intended to prohibit the sale of mineral deposits, while still allowing their leasing on a royalty basis for terms of five years or less. Thus, in our view, the Jones Act provision that minerals could be leased "as the State legislature may direct" is more logically to be interpreted as part of the provision prohibiting the sale of mineral deposits but still permitting their lease on a royalty basis. It is not an unbridled grant of power that would allow the legislature to avoid the trust restrictions and duties imposed by the entirety of the Enabling Act. It gives the legislature power to regulate the overall manner of the making of the lease, and the general terms of the lease, so long as there is substantial conformity to the restrictions of § 28. *Tucson Rock & Sand Co., supra.*

The 1936 amendment merely extends the concept of "short-term" leases from five years to twenty years. The congressional record of the 1936 act indicates no intent to alter the basic trust duties and dispositional restrictions imposed on the Arizona state government. *See generally* S. Rep. No. 1939, 74th Cong., 2d Sess. (1936); H.R. Rep. No. 2615, 74th Cong., 2d Sess. (1936).

More importantly, Congress was quite aware of just how to give states the right to make mineral leases without meeting the appraisal or true value requirements of the Enabling Act. This can be seen from a brief look at New Mexico history. In 1922, the New Mexico Supreme Court held that mineral deposits on school trust lands might be leased without complying with the appraisal and true value requirements of the New Mexico

Enabling Act. *Neel v. Barker*, 27 N.M. 605, 204 P. 205 (1922). The lands at issue had been given to the New Mexico Territory under a pre-1910 congressional grant, but the court held that the New Mexico Enabling Act was not applicable to mineral lands no matter when obtained.

The decision was not tested in federal court. Entertaining serious doubts about the *Neel* decision, and concerned about the validity of titles that might vest under the holding, the New Mexico legislature petitioned Congress to authorize a state plebiscite to codify the rule of *Neel*. *See* 69 Cong. Rec. 1517-18, 2094-95 (1928) (explanations in floor debates by New Mexico representative and senator concerning need for and limited purpose of proposed joint resolution). Congress responded by passing a joint resolution giving the electors of New Mexico the right to amend their state constitution. *See* Joint Resolution No. 7, 45 Stat. 58 (1928). *See generally* S. Rep. No. 90, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 332, 70th Cong., 1st Sess. (1928). The new provision would permit state land mineral leases without appraisement, advertisement, or competitive bidding, though the proceeds were still to be used for school trust purposes.[5]

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[5] The complete text of Joint Resolution No. 7 is given:

Resolved by the Senate and House of Representatives of the United States of America in Congress *assembled*, That consent is hereby giv[illegible]d granted to the State of New Mexico and the qualified electors thereof to vote upon the question of amending the constitution of said State and to amend the same by the adoption of the following amendment proposed by the legislature of said State at its eighth regular session by H. J. Res. 8, approved March 11, 1927, to be designated as Article XXIV, said amendment being as follows, to wit:

"Article XXIV

"CONTRACTS FOR THE DEVELOPMENT AND PROTECTION OF MINERALS ON STATE LANDS

"*Leases and other contracts, reserving a royalty to the State for the development and production of any and all minerals* on lands granted or confirmed to the State of New Mexico by the Act of Congress of June 20, 1910, entitled 'An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States,' *may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature*; the rentals, royalties, and other proceeds therefrom to be applied and conserved in accordance with the provisions of said Act of Congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made."

Consent is also given and granted to said State to enact such laws and establish such rules and regulations as it may deem necessary to carry such constitutional provision into full force and effect should the same be duly and legally adopted.

Approved, February 6, 1928.

(emphasis in second paragraph added).

The 1928 resolution applied solely to New Mexico and did not mention Arizona at all.[6]

The joint resolution indicates to us that had Congress intended that either the Jones Act or the 1936 amendment permit Arizona to engage in mineral leasing without compliance with the original appraisal and true value requirements, it would have used explicit language to accomplish that result, just as it did for New Mexico in Joint Resolution No. 7. The failure to do so in either the Jones Act, which came one year before the joint resolution, or in the 1936 amendment, which came eight years later, and the retention of the unqualified language regarding appraisal and true value in the paragraph of § 28 which follows the mineral lease provision, indicate to us that Congress did not intend Arizona to be free from the dispositional restrictions of the Enabling Act.

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[6] At a general election held on November 6, 1928, the New Mexico electorate added the substance of Joint Resolution No. 7 to the New Mexico Constitution as its Article XXIV.

The latest and most dramatic revisions of the Arizona Enabling Act in 1951 greatly reinforce this conclusion. In that statute (Pub. L. No. 44, 65 Stat. 51), despite a broader recommendation by the Secretary of the Interior,[7] Congress specifically removed the appraisal, bidding, and advertising restrictions of § 28, but *only* as they applied to leases of oil, gas, and other hydrocarbon substances. *See generally* 97 Cong. Rec. 3628-29, 5731-32 (1951) (floor debates); *see also* S. Rep. No. 194, 82d Cong., 1st Sess. (1951); H.R. Rep. No. 429, 82d Cong., 1st Sess. (1951).

In its report, the Senate Committee on Interior and Insular Affairs described the effect of the 1951 amendment as one that

> would change existing law by—(1) Permitting oil and gas leases to run for as long as oil and gas is produced in paying quantities . . . (2) Reserving a royalty to the State of not less than one-eighth of production from such [hydrocarbon] leases; and (3) Extending the exemption from the restrictions contained in the original Enabling Act which now applies to agricultural and grazing lands to include also commercial and homesite leases.

S. Rep. No. 194, 82d Cong., 1st Sess., at 2 (1951).[8]

In our view, the 1951 report of the Senate committee does not indicate a congressional belief that the 1927 Jones Act (permitting leasing on such terms "as the State legislature may direct") or the 1936 amendment (permitting mineral leasing "in a manner as the State

[7] Letter dated July 20, 1950 from Oscar L. Chapman, Secretary of the Interior, to Hon. Joseph C. O'Mahoney, Chairman of the Senate Committee on Interior and Insular Affairs. S.Rep. No. 194, 82d Cong., 1st Sess. at 3-4 (1951).

[8] The "exemption" referred to in clause 3 relates to the time extensions given in the 1936 amendment allowing the state to lease certain types of lands without the need for advertisement. *See* Pub. L. No. 658, 49 Stat. 1477 (1936).

legislature may direct") had effectively withdrawn mineral leasing from the stringent dispositional requirements of § 28 of the original Enabling Act. Further, neither the report nor the wording of the text itself permits us to conclude that Congress intended to accomplish such a result by the 1951 amendment. With respect to short term, nonhydrocarbon mineral leases, the 1951 amendment merely paraphrases in substantially identical terms the 1927 and 1936 wordings permitting grazing, agricultural, and mineral "leasing in a manner as the State legislature may direct."

Significantly, just as it had with 1928 Joint Resolution No. 7 pertaining only to New Mexico, in the 1951 amendment Congress again showed that when it wished to permit the state unrestricted authority to lease it would do so explicitly. The words it used in 1951 apply to oil, gas, and hydrocarbons alone. They are:

> Nothing herein contained shall prevent: (2) the leasing of any of [school trust lands] in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes, other than . . . oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any of said lands, . . . for . . . *oil, gas, and other hydrocarbon substances*, . . . [these types of] *leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production.*

Pub. L. No. 44, 65 Stat. 51 (1951) (emphasis added). Here again, Congress showed that when it intended to free the state from the dispositional restrictions, it would do so explicitly.

Neither the text of the 1951 amendment nor the congressional intent to be derived from the record as a

whole permits us to conclude that the procedure *explicitly* authorized only for the lease of oil, gas, and hydrocarbon deposits is also somehow to apply to other types of mineral deposits. Moreover, if Congress did not regard the dispositional restrictions of the original Enabling Act as effective against mineral leases, why did it bother to create specific exemptions in 1951 for oil, gas, and other hydrocarbon leases? Obviously, Congress made those specific 1951 exemptions precisely because it believed the Enabling Act's stringent conditions were still in force.

B. *Prior Judicial Construction*

If we were inclined to reach a contrary conclusion on congressional intent and textual meaning, we would be promptly disabused by a review of the caselaw. In *State v. Lassen*, 99 Ariz. 161, 407 P.2d 747 (1965), this court held that the state had no obligation to compensate the school trust fund for a taking of school trust land made more the purpose of highway construction. The theory was that the construction of the highway across such trust lands would enhance the value of the remainder of trust land in an amount exceeding the value of the property taken for the highway. Rejecting this argument, the United States Supreme Court reversed, holding unanimously that the disposal restrictions of § 28 of the Enabling Act applied to the taking. *Lassen v. Arizona ex rel. Arizona Highway Department*, 385 U.S. 458, 87 S.Ct. 584 (1967).[9] The Court stated that the Enabling Act "unequivocally demands" that the trust fund be paid the full value of any lands transferred from it. *Id.* at 466, 87 S.Ct. at 588.

Of course, in *Lassen* the Court was dealing with the conveyance of surface rights rather than with lease of mineral deposits. Any question about the application of the *Lassen* rule to mineral leases was disspelled by *Alamo*

[9] The *Lassen* case is discussed in Casenote, 9 ARIZ.L.REV. 113 (1967); Casenote, 42 WASH.L.REV. 912 (1967).

Land & Cattle Co. v. Arizona, 424 U.S. 295, 96 S.Ct. 910 (1976). In *Alamo*, the United States government had condemned school trust lands, and the question before the Court pertained to the division of the compensation award between the state, as owner of the fee title, and a lessee of a short term grazing lease. In effect, the lessee claimed a larger share of the compensation award on the theory that the lease had a bonus value because the rent contract was less than the fair rental value of the land.[10]

In commenting on the validity of a school trust leasehold made for less than fair rental value, Justice Blackmun, writing twenty-five years after the 1951 amendment and speaking for a seven-member majority of the Court, stated:

> The New Mexico-Arizona Enabling Act has a protective provision against the initial setting of lease rentals at less than fair rental value. This is specifically prohibited by § 28. The prohibition is given bite by the further very drastic provision that a least not made in substantial conformity with the act "shall be null and void." Thus, if the lease of trust lands calls for a rental of substantially less than the land's then fair rental value, it is null and void and the holder of the claimed leasehold interest could not be entitled to compensation upon condemnation.

Alamo, 424 U.S. at 304-05, 96 S.Ct. at 917. Later in the opinion, Justice Blackmun rejected an argument advanced by the state with respect to its power to grant compensable property interests to lessees with the following comment:

[10] Of course, the arguments made by respondents in this case with respect to short term mineral leases are equally applicable to short term grazing and agricultural leases, the lease of which was allowed by the 1936 and 1951 amendments in the same sentence as that allowing for leases of hard rock minerals.

> One seemingly apparent and complete answer to this argument is that such § 28 goes on to authorize specifically a lease of trust land for grazing purposes for a term of 10 years or less, and further provides that a leasehold, before being offered, shall be appraised at "true value." . . . Full appraised value is to be determined and measured at the times of disposition of the respective interests, and if the State receives those values at those respective times, the demands of the Enabling Act are met.

424 U.S. at 306-07, 96 S.Ct. at 917-18.

These statements seem fully dispositive of the issue. Respondents claim, however, that the quoted statements from the majority opinion in *Alamo* are both nonbinding dicta and an incorrect interpretation of the statutes and congressional intent. Even if we were to agree that the statements are dicta, we are not disposed to disregard the clear words of the United States Supreme Court on a matter of such vital public interest. For purists, however, we note our belief that the statements are not dicta. The Court remanded with instructions that the district judge determine whether *Alamo* held a valid leasehold and, if so, how it was to be evaluated. Finally, it instructed that if the leasehold value did prove to be substantially in excess of the rental set by the state, the district court should determine "whether it is permissible to find from that fact a violation of the Enabling Act's requirement" of appraisal and true value. *Alamo*, 424 U.S. at 312, 96 S.Ct. at 920; *see also id.* n.12. As we read the *Alamo* opinion, if the district court were to make such a finding, then the principles of law announced in the opinion would render the lease invalid, leaving the lessee no right to share in the award. Given the instructions on remand, we believe the Court's statements of the applicable principles of law are not dicta but are essential guidelines to the eventual disposition of the case.

Concluding this point, we reject the argument that the Supreme Court erred in its interpretation of congressional intent. We disagree with the contention and also regard it as having been made in the wrong forum.

Respondents argue that in *Farmers*, *supra*, this court held that short term mineral leases were exempt from the appraisal and true value restrictions of the Enabling Act. We do not agree. In *Farmers*, the issue was the validity of a lease authorizing the extraction of groundwater from school trust land without public auction and bidding. We held that groundwater was a product of the land, rather than a mineral, and that the state could not lease the right to withdraw water without public auction and bidding. In so doing, we noted in passing that the groundwater lease was different from a mineral lease, and stated that "[m]inerals are expressly excepted in § 28 and are subject to disposition as provided by the Legislature of the State." 111 Ariz. at 58, 523 P.2d at 489. We do not believe that this simple statement, made without analysis of the entire complex question presented in the present case, is equivalent to a holding that the state may lease the right to extract minerals from school trust land for less than the true, appraised value. In any event, this court has no power to overrule *Alamo*. *Farmers* must be read in conjunction with *Alamo* which, in our view, holds directly contrary to respondents' interpretation of *Farmers*.

RESOLUTION

A. *Interpretation of the Enabling Act*

We conclude from the foregoing that the Enabling Act is intended to protect the school trust land from dissipation by the state government. To curb such dissipation, Congress imposed severe restrictions on the method by which the state could sell or lease such lands. Undoubtedly the most important restriction is the appraisal/true value requirement. Furthermore, the amendments to the

Enabling Act do not explicitly exempt nonhydrocarbon minerals leases from the restrictions of § 28, as they do oil, gas, and other hydrocarbon leases. As we noted, the congressional record, while equivocal on some points, certainly demonstrates no congressional intent to remove the appraisal, trust, and true value restrictions from mineral leasing.

The Enabling Act is the "fundamental and paramount law" in Arizona. *Murphy*, 65 Ariz. at 345, 181 P.2d at 340. The courts have consistently construed the scope of federal land grants in favor of the government. *Mountain States Telephone & Telegraph Co. v. Kennedy*, 147 Ariz. 514, 516, 711 P.2d 653, 655 (App. 1985). In dealing with trust lands in particular, all doubts must be resolved in favor of protecting and preserving trust purposes. *United States v. New Mexico*, 536 F.2d 1324, 1326-27 (10th Cir. 1976).

Finally, as we read the views of the United States Supreme Court, as expressed in *Lassen*, and particularly in *Alamo*, we are bound to adopt the construction advanced by petitioners. We hold, therefore, that the Enabling Act and its rescript in art. 10 of the Arizona Constitution, forbid the state from making nonhydrocarbon mineral leases without appraisal or for less than their true value.

B. *Validity of the Present Arizona Statute on Mineral Leasing*

Respondents contend that the overall effect of A.R.S. § 27-234 benefits the school trust fund. While the application of a flat rate may result in the undervaluation of some leases, respondents argue that the statutory scheme promotes greater mineral exploration and development. Thus, they assert, more minerals are extracted from school trust land resulting in greater overall payments to the state at the five percent flat rate than under an appraisal/true value scheme.

There are two answers to this contention. First, a recent report of the Arizona Auditor General concludes that Arizona, the *only* state with a fixed, nonnegotiable royalty rate for mineral leases, has one of the lowest royalty rates in the nation. AUDITOR GENERAL, A PERFORMANCE AUDIT OF THE ARIZONA STATE LAND DEPARTMENT, at 19 (1980). Respondents do not dispute this fact.[11] Second, it is not certain that higher royalty rates discourage exploration and development and result in lower production. In fact, the data indicate that market forces determine production and royalty rates; a market royalty rate does not have a significant adverse effect on production. Smith, *Elements of Mineral Leasing Systems for State Lands with Comments on the Laws of Selected States*, at 44-47 (1980) (unpublished manuscript); Magma Brief, at A-102 to -105. In addition, we note that the state mineral royalty receipts had declined to $1.3 million in 1986 from the 1980 return of almost $8 million. AUDITOR GENERAL, A PERFORMANCE AUDIT OF THE STATE LAND DEPARTMENT, at 45 (1987). Thus, it appears that the net flat rate statute has not served to protect the state's royalty income from the market-related decline in mineral production of the last decade.

Further, respondents' cause would not be enhanced even if the overall effect of A.R.S. § 27-234(B) encourages greater production so that lessees pay higher total royalties to the state than would be paid on a fair value basis. The United States Supreme Court has specifically rejected such arguments. In *Lassen*, the state argued that the highway department's acquisition of school trust lands for highway purposes without payment would have an overall beneficial effect on the value of the remaining

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[11] *See also* JOINT LEGISLATIVE BUDGET COMMITTEE, FOLLOW-UP REPORT OF PERFORMANCE AUDIT RECOMMENDATIONS FOR THE ARIZONA STATE LAND DEPARTMENT, at 3-5 (Sept. 1982) (use of net royalty results in substantially reduced royalty revenues compared with gross royalty).

school trust lands. The state posited that the improvements made would enhance the lands' value and thus promote their sale because the highway would make the lands more accessible. The Supreme Court rejected that argument, holding that the fair value requirement could not be discarded on the basis of speculative predictions about possible future development and values. Such methods did not comply with the basic purposes of Congress in imposing trust restrictions. 385 U.S. at 468-69, 87 S.Ct. at 589-90.

Finally, unlike most mineral lease royalties, the Arizona flat rate royalty is computed on the "net value" of the minerals extracted. *See* ROCKY MOUNTAIN MINERAL LAW FOUNDATION, 3 AMERICAN LAW OF MINING ch. 63 (2d ed. 1986). Under the Arizona statute, the net value is determined by subtracting both the cost of extraction and the cost of "processing." Given a gross value set by the market, and deduction of extraction, transportation, and processing costs, many minerals may have no "net value" at all as far as the statutory formula is concerned. Thus, under § 27-234(B) it is possible for a lessee to extract minerals from school trust lands and pay no royalty whatsoever. Of course, we have no way of knowing from this record whether such circumstances have existed, but the possibility is implicit in the statute.

The State Land Department contends that we may "save" the statute in question simply by holding that the five percent flat rate royalty is a minimum, below which no lease can be made. Armed with the "such manner as the Legislature directs" wording, the state legislature undoubtedly may set a minimum royalty for each lease of mineral deposits. It is obvious, however, that § 27-234 does just the opposite. The statute does not provide for a five percent minimum with an actual rental to be based upon appraisal and true value. It simply provides for a five percent flat rate. Flat rates set a maximum return. *Tucson Rock & Sand Co., supra.* There is, in short, little to save.

In any event, whatever the overall benefit to the state of a flat net rate scheme, we do not believe that a statute that makes it possible to dispose of trust assets without payment of true value can be upheld under the trust duty concept required by the Enabling Act. *County of Skamania, supra.* We hold, therefore, that A.R.S. § 27-234 violates art. 10 of the Arizona Constitution and § 28 of the Enabling Act. The statute is unconstitutional and void as to nonhydrocarbon mineral leases.[12]

ATTORNEY'S FEES

We must also consider the matter of attorney's fees. Petitioners seek an allowance of fees against the State Land Department and the State Land Commissioner ("State") on several grounds. First, they claim entitlement to an allowance of fees under A.R.S. § 12-348(A). That statute requires an award of fees to a party who prevails by adjudication on the merits in:

> (3) A court proceeding to review an agency decision or any other statute authorizing judicial review of agency decisions;
>
> * * * *
>
> (5) A special action proceeding brought by the party to challenge an action by the state against the party.

The State argues that neither of the subsections is applicable. It first urges that this case does not involve

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[12] Arizona contains a wide variety of commercially exploitable hydrocarbon and nonhydrocarbon minerals. See the detailed discussion in COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, MINERAL AND WATER RESOURCES OF ARIZONA, 90th Cong., 2d Sess., at 59-467 (1969). In recent year, Arizona's mines have produced over one billion dollars annually in metallic ores alone. *See, e.g.,* UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF MINES, 2 MINERALS YEARBOOK: 1985, at 59-77 "The Mineral Industry of Arizona" (1985).

a review of the agency decision to award any particular lease nor does any statute authorize judicial review of such decisions of the State Land Department. We agree that this case does not represent a "proceeding to review an agency decision," unless one defines "decision" as encompassing the department's day-to-day operations in making and renewing leases over the years since the legislature enacted § 27-234(B). We do not believe that this is what the legislature intended by the fee statute. In our view, the legislature contemplated a specific proceeding or dispute with an agency in which a particular determination by that agency is challenged and is set aside. *See New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 696 P.2d 185 (1985) (court disallowed fees under § 12-348(A)(3) when contractor sued state to obtain damages incurred pursuant to state's breach of construction contract). In the case before us, petitioners challenge the statute the agency applied. They did not ask the court to review an agency decision as required by A.R.S. § 12-348(A)(3). Nor do we believe a fee award can be based on subsection (5). The state took no action "against" petitioners when it awarded leases to respondents.

Petitioners also claim to be eligible for an award of fees under the so-called "substantial benefit doctrine." Under this doctrine, courts have inherent equitable power to award fees, notwithstanding the "American Rule" against recovery of fees in the absence of statutory authority. *See Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943 (1973). Arizona law is cognizant of the substantial benefit doctrine, but has neither adopted nor rejected it. *See State v. Boykin*, 112 Ariz. 109, 113-14, 538 P.2d 383, 387-88 (1975) (vacating the trial court's award of fees based on "inherent power" as an abuse of discretion because the "private attorney general" doctrine was inapplicable where the "appellees were not pressing their claim in hopes of directing 'substantial benefits to the

general public.'" 112 Ariz. at 114, 538 P.2d at 388.). In the case before us, unlike *Boykin*, it is obvious that petitioners seek no recovery for themselves, and will achieve no personal advantage. They do not act for their own benefit, nor even for the benefit of a particular class or group, but only for the purpose of vindicating the interests of the entire citizenry of the state of Arizona. *See generally* Note, *Equitable Attorney's Fees to Public Interest Litigants in Arizona*, 1984 ARIZ.ST.L.J. 539 (1984). They have succeeded and have conferred a substantial benefit on the citizens of Arizona. Given these circumstances, and the direct contemplation of the last paragraph of § 28 of the Enabling Act that citizens of the state may act for the benefit of the state as a whole in enforcing the dispositional restrictions of § 28, the author and Chief Justice Gordon believe that an award of fees is proper. *See also Comment, Important Rights and the Private Attorney General Doctrine*, 73 CALIF. L.REV. 1929 (1985).

CONCLUSION

The judgment of the trial court is reversed. The case is remanded with instructions to enter judgment in favor of petitioners, Kadish, Pickens, and the Arizona Education Association. The trial court is instructed to enter a judgment declaring A.R.S. § 27-234 unconstitutional and invalid as it pertains to nonhydrocarbon mineral leases. There being neither a majority nor plurality in favor of a fee award, no fee allowance is ordered.

Petitioners also sought special action relief from the trial court. It is not possible to tell on this record just what further relief is appropriate. The trial court is instructed to hear arguments and, if appropriate, take evidence on that question and to grant such relief as may be appropriate and consistent with the principles announced in this decision.

STANLEY G. FELDMAN
Vice Chief Justice

CONCURRING:

FRANK X. GORDON, JR.
Chief Justice

Justice James Moeller did not participate in the determination of this matter.

HOLOHAN, Justice, concurring

I concur, except with that portion of the opinion permitting the allowance of fees.

WILLIAM A. HOLOHAN
Justice

CAMERON, Justice, dissenting

I regret that I must dissent. We are presented with two questions:

1. Did Congress intend for mineral leases to be subject to the appraisal, competitive bidding, and advertising requirements of Section 28 of the Enabling Act?
2. Does the fixed-rate royalty provision of A.R.S. § 27-234(B) provide maximum revenue for school lands consistent with the trust principles imposed by the Enabling Act on federally granted lands?

I believe the answer to Question 1 is no and the answer to Question 2 is yes. I would, therefore, affirm the decision of the trial court.

INTENT OF CONGRESS

At the time of enactment, the Enabling Act imposed an appraisal requirement on "[a]ll lands, leaseholds, timber and other products of the land." As originally enacted, the Enabling Act did not grant to the states

known mineral lands. Subsequent discovery of minerals on vested lands, however, would not void title. *See Wyoming v. United States*, 255 U.S. 489, 41 S.Ct. 393 (1921).

In 1922, the Supreme Court of New Mexico held that since Congress had not originally contemplated the conveyance of any mineral lands to the state via the Enabling Act, it had not intended that the Enabling Act's leasing provisions should govern mineral leasing procedures. *Neel v. Barker*, 27 N.M. 605, 204 P. 205 (1922). The court held valid an oil and gas lease issued without the procedural requirements of formal appraisal, advertisement, or public auction. *Id.* at 605, 204 P. at 205. Subsequently, the New Mexico Legislature requested that Congress authorize a constitutional amendment codifying *Neel v. Barker*. Congress responded by passing the Act of February 6, 1928, ch. 28, 45 Stat. 58, which authorized New Mexico to lease lands granted under the Enabling Act for mineral purposes without rega d to appraisal, advertising, or competitive bidding. The mineral rights in the granted lands, however, could not be sold by the state, but only leased. Following the New Mexico example and as a result of the Jones Act, Arizona, prior to the 1936 amendment, similarly could have leased its granted lands for mineral purposes without complying with the appraisal, advertising, and bidding requirements. Pub. L. No. 570, ch. 57, 44 Stat. 1026 (1927).

The Act of June 5, 1936, ch. 517, 49 Stat. 1477, provided for the lease of mineral lands for a term of twenty years or less, "in a manner as the State legislature may direct." Subsequently, section 28 was amended again by the Act of June 2, 1951, ch. 120, 65 Stat. 50. This amendment liberalized the restrictions placed on school lands, stating in part:

> Nothing herein contained shall prevent: . . . 2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe,

> whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; . . . .

Pub. L. No. 44, ch. 120, 65 Stat. 50 (1951); *see* Ariz. Const. art. 10, § 3, Congress, in plain words, granted the Arizona Legislature the power to lease school lands for mineral development for a term of 20 years or less, in such a manner as Arizona's legislature might elect.[1]

In construing the 1936 amendment consistent with its historical background, the state legislature, in prescribing the manner for leasing mineral lands, is not limited by the requirements of appraisal, competitive bidding and advertising.[2] *See Farmers Inv. Co. v. Pima Mining Co.*, 111 Ariz. 56, 58-59, 523 P.2d 487, 489 (1974) ("Minerals are expressly excepted in § 28 and are subject to

[1] Speculators mulling the reasons for this liberalization contend that a change in Congressional policy occurred in the 1950s concerning the type of restrictions placed on trust lands. The Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958), for example, imposed no trust provisions or other limitations on Alaska's state lands, *i.e.*, Alaska was given a "free transfer." The Alaska state land policy, therefore, reflects a veritable about-face by Congress when it is compared with the restrictions placed upon Arizona. The potential concerns and harms caused by an absence of trust controls on state land is stated accurately by one commentator: "If there is to be no control over the price of sale or lease, certainly the pro-school forces have sufficient grounds to be alarmed. There could be a total depletion of the trust lands with almost no income—all in the name of the public good." Dunipace, *Arizona's Enabling Act and the Transfer of State Lands for Public Purposes*, 8 ARIZ. L. REV. 133, 138 (1966).

[2] Minerals clearly are not subject to appraisal as "other products of the land." Because mineral lands were reserved to the federal government under the Enabling Act, Congress could not have contemplated their inclusion in "other products of the land." *See* State Land Dept. v. Tucson Rock & Sand Co., 107 Ariz. 74, 76, 481 P.2d 867, 870 (1971).

> disposition as provided by the Legislature of the State.") Considering the history of the legislation and the amendments to our Enabling Act, I believe the legislature has the power to provide for leasing of mineral lands without appraisal.

MAXIMUM RETURN

In 1981, we held that school trust lands could not be sold without public auction to the Arizona Division of Emergency Services (ADES), even though ADES was a state agency. *Gladden Farms, Inc. v. State*, 129 Ariz. 516, 633 P.2d 325 (1981). The court found it important to note that simply because sale of the land in trust to another state agency, it did not necessarily provide the protection to the trust lands that Congress intended. *Id.* at 520, 633 P.2d at 329. Furthermore, the court also commented that the purpose for the sale of lands in trust is irrelevant; of paramount concern is maximum return from the trust:

> However worthwhile and desirable this sale may be for the humanitarian purposes for which it is made, we do not believe that the sale without auction and bid assures the "highest and best" price that the Enabling Act requires. The Enabling Act does not allow trust lands to be used for the purpose of subsidizing public programs no matter how meritorious the programs.

Id. at 521, 633 P.2d at 330.

Court opinions concerning the trust land provisions in Arizona strictly interpret the Enabling Act in order to protect the beneficiaries of the trust. Even though mineral leases are exempt from the Enabling Act's formal leasing requirements, mineral lands are included in the corpus of the state trust properties and the state is not absolved from its fiduciary duties as trustee. *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584 (1967). The state,

as trustee, acts in a fiduciary capacity in the administration of state trust lands and has a duty to maximize the revenues generated by the trust corpus. If the fixed-rate royalty limits the return from the trust land, then it would be contrary to the provisions of the trust and would be deemed a breach of the trust. Act of June 20, 1910, ch. 310, 36 Stat. 557 § 28. *See also Alamo Land and Cattle Co. v. Arizona*, 424 U.S. 295, 96 S.Ct. 920 (1976).

At the time of the filing of the instant case, the relevant portion of A.R.S. § 27-234 provided:

> B. Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim. The net value shall be deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production thereof. In case of minerals not processed for commercial use, the net value shall be the gross proceeds, or gross value, at the place of sale or use, less the actual cost of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production thereof.

A.R.S. § 27-234(B).

In reviewing the testimony in the trial court, I believe there is sufficient evidence from which it can be found that a royalty of five percent returns an equal if not a greater amount to the school trust account than could be obtained through other methods of leasing. The legislature, in establishing a royalty rate, may balance the revenue to be received with the discouragement of future mining operations that might occur with the imposition

of higher royalty rates. Furthermore, it should be noted that mineral deposits are of a unique nature. While timber, range land and even rock and gravel can be easily evaluated and appraised before exploitation, mineral deposits are almost impossible to value until after extensive and often expensive exploration. Such deposits must first be discovered, explored and developed before mining.

In this regard, the statement by the majority should be noted that "the state mineral royalty receipts had declined to $1.3 million in 1986 from a 1980 return of $8 million. . . . It appears that the net flat rate statute has not served to protect the state's royalty income from the market-related decline in mineral production of the last decade." Slip opinion, page 30. I believe this is misleading. The decline in mineral production in the past decade was due to market conditions and not the flat rate royalty. Indeed, rising costs of production of mineral could well have resulted in less production and less revenue. As the brief of Magma Copper pointed out, there is no positive correlation between royalty rates and income derived from state trust lands. To the contrary, the Auditor General's Report shows that California has the highest royalty rate of the states examined, but the revenue derived from all state mineral leases totalled only $259,000 for the fiscal year 1978-79. Arizona for the same fiscal year generated an income of $3.4 million.

In the appendix to Magma Copper's brief, Spencer Smith stated that he examined the status of California's metallic leases and that: "The ten percent minimum royalty imposed in California is one of the primary reasons for the lack of metallic mineral production on their [California's] state lands." Letter from Spencer A. Smith to C. J. Hansen, President Arizona Mining Association (December 22, 1980) (discussing S. Smith, Elements of Mineral Leasing Systems for State Lands with Com-

ments on the Laws of Selected States (July 7, 1980) (unpublished article)).

I believe that the legislature has properly determined that a fixed-royalty rate appropriately maximizes the revenues to be generated by mineral leases on the school lands. I would hold that A.R.S. § 27-234(B) does not violate the Enabling Act or the Arizona Constitution.

I would affirm the judgment of the trial court.

JAMES DUKE CAMERON,
Justice

APPENDIX B

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CC12-88725 January 2, 1985

No. C 433745

HON. JOHN R. STICHT

Vivian Kringle, Clerk
P. Cook, Deputy

FRANK AND LORAIN KADISH, *et al.*

v.

ARIZONA STATE LAND DEPARTMENT,
an agency of the State of Arizona, *et al.*

MAGMA COPPER COMPANY,
a Delaware Corporation doing business in Arizona, *et al.*,
Intervenors.

Plaintiffs' Motion for Partial Summary Judgment, the Motion for Summary Judgment of Magma Copper Company and the Motions to Dismiss of ASARCO Incorporated and Eisenhower Mining Company, which have been treated as Motions for Summary Judgment, have been under advisement. After considering the briefs of all parties, the Court finds that there are no genuine issues of material fact and that Defendants are entitled to Summary Judgment as a matter of law.

Plaintiffs have brought this action testing the validity of A.R.S. § 27-234(B) which provides for a fixed royalty for mineral leases of State lands. That statute provides for payment to the State by the lessee of a royalty of five percent (5%) of the net value of minerals produced from the claim. In particular, Plaintiffs argue that, as to school trust lands, the fixed royalty violates § 28, Paragraph 4 of Arizona's Enabling Act and Art. 10 § 4 of the Arizona Constitution which require that all such lands, leaseholds, timber and other products of land, before being offered for sale or lease, shall be appraised at their true value and that no sale or other disposal thereof shall be made for a consideration less than the value ascertained.

Plaintiffs claim that the various mineral leases held by the Intervenors of State trust lands are void. The Intervenors claim that the leases, which are all for 20 years or less, fall within the exception provision of § 28, Paragraph 3 of the Enabling Act and Art. 10 § 3, Paragraph 2 of the Arizona Constitution which provide for the leasing of mineral lands for a term of 20 years or less "as the legislature may direct". Intervenors claim that the quoted language on its face, and viewed in legislative historical perspective, permits the State legislature to control the terms and manner of the leases of mineral lands for a period of 20 years or less, without regard to advertisement, bidding or appraisement. In rebuttal, Plaintiff argues that this interpretation ignores the fundamental purpose of the trust restrictions in the Enabling Act and is meant to be language dealing only with the procedure of leasing and not a release from the prior appraisal requirements.

The Court has reviewed the legislative history behind the 1910 New Mexico-Arizona Enabling Act, the Arizona amendments in 1936 and 1951, the corresponding amendments to the Arizona Constitution and the New Mexico experience in addition to the 1927 Act and the cases cited.

These matters have been covered thoroughly in the comprehensive briefs of the parties and the arguments relating thereto will not be reiterated here. Suffice it to say that the Court concludes that the language "as the legislature may direct" which was inserted by Congress in the 1936 amendment to § 28, Paragraph 3 and carried forward in the 1951 amendment, reflects the intent by Congress to place Arizona on an equal footing with the other states in dealing with its mineral lands, including the right to lease said lands for a term of 20 years or less without regard to prior appraisement, advertising, bidding and public auction. The Court recognizes that there is strong language in *Alamo Land and Cattle Company Inc. v. Arizona*, 424 U.S. 295 (1976) which indicates that prior appraisement is necessary before leases shall be given. However, the issue currently before the Court was not at issue in the *Alamo* case and thus this Court finds that the language is not controlling.

IT IS ORDERED denying Plaintiffs' Motion for Partial Summary Judgment.

IT IS FURTHER ORDERED granting Intervenors' Motions for Summary Judgment, the Court finding that A.R.S. § 27-234(B) does not violate either the Arizona Enabling Act or the Arizona Constitution.

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. C433745

FRANK AND LORAIN KADISH; MARION L. PICKENS; and the ARIZONA EDUCATION ASSOCIATION, a nonprofit corporation,

Plaintiffs,

v.

ARIZONA STATE LAND DEPARTMENT, an agency of the State of Arizona; JOE T. FALLINI, in his capacity as the State Land Commissioner; and CYPRUS PIMA MINING COMPANY, on behalf of itself and others similarly situated,

Defendants,

ASARCO Incorporated, a New Jersey corporation; MAGMA COPPER COMPANY, a Delaware corporation; JAMES P. L. SULLIVAN, ESQ.; EISENHOWER MINING COMPANY, a partnership; and CAN-AM CORPORATION, an Arizona corporation,

Intervenors.

JUDGMENT

This action was on January 26, 1984 certified by the Court to be maintained pursuant to Rule 23(b)(1)(B) against a class of parties consisting of those holding or who will hold in the future mineral leases administered by the Arizona State Land Department, the Court directing that Plaintiffs give a prescribed Notice of Class Action Certification to all parties currently holding mineral leases administered by the Arizona State Land Department and further directing that Defendant Arizona

State Land Department give said notice to all its future mineral lessees at or before the time the new mineral leases take effect.

The Court allowed the following holders of mineral leases to intervene:

ASARCO Incorporated
Magma Copper Company
Eisenhower Mining Company
James P. L. Sullivan
Can-Am Corporation

and each of said Intervenors filed an Answer.

The Order of the Court certifying this action as a Class Action designated Defendant Cyprus Pima Mining Company and Intervenor Defendants ASARCO Incorporated and Magma Copper Company through their respective counsel as representatives of the class finding that they will fairly and adequately protect the interest of the class.

Plaintiffs' Motion for Partial Summary Judgment and the Motion for Summary Judgment filed by Magma Copper Company and the Motions to Dismiss (treated as Motions for Summary Judgment by the Court) filed by ASARCO Incorporated and Eisenhower Mining Company were heard on September 7, 1984. At said hearing Intervenor James P. L. Sullivan appeared pro se and Plaintiffs and each of the other Intervenors appeared through their respective legal counsel.

The Court having read the Motions and supporting affidavits and the Response of the Attorney General on behalf of Defendant State Land Department, and having heard the arguments of counsel made at said September 7, 1984 hearing and being fully advised in the premises, on January 2, 1985 entered its Order by minute entry finding that there are no genuine issues of material fact and denying Plaintiffs' Motion for Partial Summary

Judgment and granting Intervenors' Motion for Summary Judgment;

NOW, THEREFORE, on motion of Intervenors, it is ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' complaint be and the same is hereby dismissed with prejudice; and

2. Each party shall bear its own costs and attorneys' fees.

DONE IN OPEN COURT this 22nd day of July, 1985.

/s/ John R. Sticht
HONORABLE JOHN R. STICHT
Judge of the Superior Court

Original of the foregoing lodged
this 12th day of July, 1985, with:

The Honorable John R. Sticht
Judge of the Superior Court
Maricopa County—Division 41
201 West Jefferson
Phoenix, Arizona 85003

and a copy mailed this 12th day of
July, 1985, to:

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Amy J. Gittler, Esq.
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BURTON M. APKER

APPENDIX D

[SEAL]

SUPREME COURT
STATE OF ARIZONA

201 West Wing State Capitol
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Telephone (602) 255-4536

DAVID R. COLE
Clerk of Court

February 3, 1988

RE: FRANK and LORAIN KADISH et al vs. AZ STATE LAND DEPT et al
Supreme Court No. CV-86-0238-T
Court of Appeals No. 1 CA-CIV 8616
Maricopa County No. C-433745

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 2, 1988, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration on the Issue of Attorneys' Fees [Appellants Kadish/Pickens/AZ Ed Assn] = DENIED.

FURTHER ORDERED: Motion for Leave to File Reply [Appellants Kadish] = GRANTED.

Justice Moeller did not participate in the determination of this matter.

Mandate enclosed.

DAVID R. COLE, Clerk

TO:

Amy J. Gittler, Esq., Brown & Bain

David S. Baron, Esq., Arizona Center for Law in the Public Interest

Hon. Robert K. Corbin, Attorney General
Attn: Melinda L. Garrahan, Esq. and James T. Skardon, Esq.

Tom Galbraith, Esq., Lewis and Roca

Burton M. Apker, Esq., Kaufman, Apker & Nearhood

Howard A. Twitty, Esq., Twitty, Sievwright & Mills

James P. L. Sullivan

Mark S. Sifferman, Esq., Molloy, Jones, Donahue, Trachta, Childers & Mallamo

Arthur J. Waskey, Esq., New Mexico State Land Office
Attn: Louhannah M. Walker, Esq.

APPENDIX E

Jones Act of 1927, as amended, ch. 57, Pub. L. No. 570, § 1, 44 Stat. 1026-27; ch. 151, Pub. L. No. 110, 47 Stat. 140 (1932); ch. 169, Pub. L. No. 340, 68 Stat. 57 (1954); ch. 572, Pub. L. No. 699, 70 Stat. 529 (1956) (codified as amended at 43 U.S.C. § 870 (1976)).

Subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

(a) That the grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

(b) That the additional grant made by this Act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and* rentals and royalties therefrom to be utilized for the

* The word "and" was introduced here probably by mistake instead of the word "of" when the act was amended in 1932. As quoted in text, the language as originally enacted in 1927 referred to "the proceeds of rentals and royalties."

support or in aid of the common or public schools: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

(c) Except as provided in subsection (d), any lands included within the limits of existing reservations of or by the United States, or specifically reserved for waterpower purposes, or included in any pending suit or proceedings in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claims, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this Act.

(d) (1) Notwithstanding subsection (c), the fact that there is outstanding on any numbered school section, whether or not mineral in character, at the time of its survey a mineral lease or leases entered into by the United States, or an application therefor, shall not prevent the grant of such numbered school section to the State concerned as provided by this Act.

(2) Any such numbered school section which has been surveyed prior to the date of approval of this amendment, and which has not been granted to the State concerned solely by reason of the fact that there was outstanding on it at the time of the survey a mineral lease or leases entered into by the United States, or an application therefor, is hereby granted by the United States to such State under this section as if it had not been so leased; and the State shall succeed the position of the United States as lessor under such lease or leases.

(3) Any such numbered school section which is surveyed on or after the date of approval of this amend-

ment and on which there is outstanding at the time of such survey a mineral lease or leases entered into by the United States, shall (unless excluded from the provisions of this section by subsection (c) for a reason other than the existence of an outstanding lease) be granted to the State concerned immediately upon completion of such survey; and the State shall succeed to the position of the United States as lessor under such lease or leases.

(4) The Secretary of the Interior shall, upon application by a State, issue patents to the State for the lands granted by this Act, in accordance with the Act of June 12, 1934 (48 Stat. 1185, 43 U.S.C. 871a). Such patent shall, if the lease is then outstanding, include a statement that the State succeeded to the position of the United States as lessor at the time the title vested in the State.

(5) Where at the time rents, royalties, and bonuses accrue the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, the rents, royalties, and bonuses shall be allocated between them in proportion to the acreage in said lease owned by each.

(6) As used in this subsection, 'lease' includes 'permit' and 'lessor' includes 'grantor'.

New Mexico-Arizona Enabling Act of 1910, ch. 310, Pub. L. No. 219, § 24.

Sec. 24. That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or

fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein . . . .

New Mexico-Arizona Enabling Act of 1910, as amended, ch. 310, Pub. L. No. 219, § 28, 36 Stat. 557, 574-75; ch. 517, Pub. L. No. 658, 49 Stat. 1477 (1936); ch. 120, Pub. L. No. 44, 65 Stat. 51 (1951).

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatso-

ever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auctoon to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and homesite purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in, or under said lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

ARIZ. REV. STAT. ANN. § 27-234(B) (1976 and Supp. 1987).

B. Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim. The net value is deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production of the minerals. In case of minerals not processed for commercial use, the net value is the gross proceeds, or gross value, at the place of sale or use, less the actual cost of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production of the minerals. The lease shall not require the payment of any royalty in advance of actual production of minerals from the claim.

* * * *